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Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP appreciates this opportunity to comment on the pending proposal of the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). As one of the leading appellate practices in the United States, we have broad experience in all manner of cases, particularly complex civil litigation, before the federal courts of appeals. Based on this experience, we respectfully oppose the proposed amendment to reduce the word limits on appellate briefs under Rule 32. We do not oppose the proposal to eliminate the "three-additional-days" rule for electronic service under Rule 26(c); in the event the Committee repeals that rule, however, we urge the Committee to adopt an accompanying amendment to preserve the existing *de facto* seventeen-day deadline for filing a reply brief.

Rule 32: Word Limits

We respectfully submit that the proposal to reduce the word limits for appellate briefs from 14,000 words to 12,500 words for opening briefs, and from 7,000 words to 6,250 words for reply briefs, should not be adopted. The current word limits, which have functioned

effectively for the last sixteen years, strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions. As explained below, a reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits.

We appreciate the importance of brevity and concision in appellate briefing and strive to achieve those goals in our work. We also understand the concern that some advocates unfortunately fail to embrace these principles and submit unnecessarily long briefs. *See, e.g.,* Comments of Hon. Laurence H. Silberman, at 1 (Jan. 13, 2015) ("Silberman Comments"). But the proposed word limits, we believe, would unduly constrain all litigants in their ability to submit sufficiently informative and comprehensive briefs across cases. Litigants already face a strong disincentive against submitting unduly long briefs—such briefs are simply not effective. *See* Silberman Comments, at 1. And while there may be *some* cases that can be well briefed in less than 14,000 words, that is not true for *all* cases, in our experience.

Indeed, a substantial number of cases in the courts of appeals today are highly complex—involving, for example, intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law. Proper exposition of these cases requires *at least* the existing word limit to adequately present the facts and legal issues for the benefit of the court. As other commenters have observed, *see e.g.*, Comments of American Academy of Appellate Lawyers, at Section D(5) (Dec. 2, 2014), this complexity is only growing. Thus, although the proposed amendment might lead to

shorter briefs, we, like other commenters, are skeptical of the premise that it would actually produce better or more helpful briefs. *See* Comments of Reed Smith, at 3 (Feb. 10, 2015).

Moreover, a reduced word limit would impose particular harm on parties on the same side of a consolidated or joint appeal who, under the local rules of several circuits, must submit a joint brief. *See, e.g.*, United States Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 37 (explaining that "[p]arties with common interests in consolidated or joint appeals must join in a single brief where feasible" and that the court "looks with extreme disfavor on the filing of duplicative briefs"). The parties must often make difficult compromises in determining how best to present the legal issues. Moreover, such cases often involve a challenge by multiple parties to agency action. The Government, as the opposing party, does not share such challenges and can benefit from a divided opposition. Reducing the word limits would only exacerbate this disparity.

A reduced word limit would lead to other problems. It would increase administrative burdens on the appellate courts because there would surely be an increased number of motions to exceed the word limit. A reduced word limit also could force litigants to abandon or drastically shorten meritorious arguments; the appellate courts would increasingly need to resolve questions of waiver.

Finally, we note that appeals court filings have decreased by fifteen percent over the past ten years. *See* Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014, Caseload Analysis, U.S. Court of Appeals (Feb. 17, 2015), *available at*

http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx. Consequently, the courts are less burdened, in terms of the total amount of briefing they must review, than they were when the current word limits were adopted.

In sum, the existing word limits have worked well over the past sixteen years, striking a proper balance in the vast majority of cases. The proposed reduction in word limits would have undesirable consequences that outweigh the purported benefit of having shorter—but not necessarily better—briefs. We respectfully suggest that the current word limits in Rule 32 be retained.

Rule 26(c): The "Three-Additional-Days" Rule

The Committee also proposed eliminating the three additional days to file a response provided under Rule 26(c) for a party receiving electronic service. We agree that this rule is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously, and that such service is today the prevailing mode of service.

We note, however, that because most litigants do opt for electronic service, the proposed change would effectively reduce the time for filing a reply brief from the current *de facto* period of seventeen days (fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)) to fourteen days. Maintaining the existing seventeen-day period for reply briefs would allow counsel sufficient time to draft such briefs, coordinate with

clients or other parties, and avoid burdening courts with an increase in requests for extensions of time.

We therefore urge the Committee to accompany any elimination of Rule 26(c) with an offsetting amendment to preserve the existing seventeen-day period for filing a reply brief.

Sincerely yours,

/s/ Theodore J. Boutrous Jr.	/s/ Thomas G. Hungar	/s/ Caitlin J. Halligan
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